UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES H. CUNNINGHAM, Petitioner, v. JOHN MARSHALL, Warden, Respondent.	Civil No. 07cv2183-DMS (RBB) **ORDER: (1) GRANTING APPLICATION TO PROCEED IN FORMA PAUPERIS; (2) DENYING MOTION FOR STAY AND ABEYANCE WITHOUT PREJUDICE; AND, (3) DIRECTING A RESPONSE TO PETITION**

Petitioner, a state prisoner proceeding pro se, has submitted a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis and a Motion for Stay and Abeyance.

IN FORMA PAUPERIS APPLICATION

Petitioner has no funds on account at the California correctional institution in which he is presently confined. Petitioner cannot afford the $5.00 filing fee. Thus, the Court **GRANTS** Petitioner's application to proceed in forma pauperis, and allows Petitioner to prosecute the above-referenced action as a poor person without being required to prepay fees or costs and without being required to post security.

MOTION FOR STAY AND ABEYANCE

Petitioner has filed a Motion for Stay and Abeyance requesting the Court to hold his Petition in abeyance while he returns to state court to exhaust newly discovered and potentially meritorious claims which he could not have previously exhausted because the facts supporting the claims were not known, and could not have been presented at an earlier time. (Pet.'s Motion for Stay at 3.) Petitioner does not identify which claim or claims he wishes to present to the state court. The Petition itself presents four claims, all of which Petitioner contends have been presented to the state supreme court. (Pet. at 6-9.) Therefore, Petitioner has not identified a claim, either in the Petition or in his Motion for Stay and Abeyance, which he wishes to present in this Court but which he has not already presented to the state supreme court.

In Rhines v. Weber 544 U.S. 269, 125 S.Ct. 1528 (2005) the Supreme Court held that District Courts have limited discretion to hold in abeyance a mixed habeas petition, that is, one containing both exhausted and unexhausted claims, in order to permit a petitioner to return to state court to exhaust additional claims while the federal proceedings are stayed. Rhines, 125 S.Ct. at 1534-35. The Rhines Court held that "a stay and abeyance 'should be available only in limited circumstances,' and is appropriate only when the district court determines that there was 'good cause' for the failure to exhaust." Jackson v. Roe, 425 F.3d 654, 661 (9th Cir. 2005) (quoting Rhines, 125 S.Ct. at 1535). Moreover, in order to be entitled to a stay, Petitioner **must demonstrate there are arguably meritorious claims which he wishes to return to state court to exhaust and that he is diligently pursuing his state court remedies with respect to those claims.** Jackson, 425 F.3d at 661; Anthony v. Cambra, 236 F.3d 568, 575 (9th Cir. 2000).

Petitioner has failed to make the required showing because, although he summarily alleges that his unexhausted claims are potentially meritorious and that he has diligently pursued his state court remedies, he has failed to identify a claim which has not been exhausted, and has failed to include facts supporting his allegations. Neither the Motion for Stay and Abeyance nor the Petition itself identifies a claim which Petitioner has not presented to the state supreme court. Accordingly, Petitioner's Motion for stay and abeyance is **DENIED**. The denial is without prejudice to Petitioner to renew his Motion for stay and abeyance, if he wishes, in which he addresses these concerns in his brief in support of his renewed motion. If Petitioner renews his stay motion, he must identify which claim or claims he has not exhausted and wishes to exhaust, and must set forth facts in an attempt to demonstrate good cause for his failure to timely exhaust the state court remedies with respect to any unexhausted claim. Petitioner may renew his Motion for Stay and Abeyance on or before **December 31, 2008**. If Petitioner files a renewed Motion for Stay and Abeyance, Respondent may file a response within thirty (30) days of service by Petitioner of the renewed Motion.

ORDER DIRECTING A RESPONSE

In accordance with Rule 4 of the rules governing petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and upon a preliminary review of the Petition, **IT IS ORDERED** that:

a. The Clerk of this Court shall promptly (a) serve a copy of the Petition and a copy of this Order on the Attorney General for the State of California, or his authorized agent; and (b) serve a copy of this Order on Petitioner.

b. If Respondent contends the Petition can be decided without the Court's reaching the merits of Petitioner's claims (e.g., because Respondent contends Petitioner has failed to exhaust any state remedies as to any ground for relief alleged in the Petition, or that the Petition is barred by the statute of limitations, or that the Petition is subject to dismissal under Rule 9 of the Rules Governing § 2254 Cases, or that all of the claims are procedurally defaulted, or that Petitioner is not in custody), Respondent shall file a motion to dismiss pursuant to Rule 4 of the Rules Governing § 2254 Cases no later than **January 31, 2008**. The motion to dismiss shall not address the merits of Petitioner's claims, but rather shall address all grounds upon which Respondent contends dismissal without reaching the merits of Petitioner's claims is warranted.[1] At the time the motion to dismiss is filed, Respondent shall lodge with the Court all records bearing on Respondent's contention in this regard. A hearing date is not required for the motion to dismiss.

---

[1] If Respondent contends Petitioner has failed to exhaust any state remedies as to any ground for relief alleged in the Petition, the motion to dismiss shall also specify the state remedies still available to Petitioner.

c. If Respondent files a motion to dismiss, Petitioner shall file his opposition, if any, to the motion no later than **February 25, 2008**. At the time the opposition is filed, Petitioner shall lodge with the Court any records not lodged by Respondent which Petitioner believes may be relevant to the Court's determination of the motion.

d. Unless the Court orders otherwise, Respondent shall not file a reply to Petitioner's opposition to a motion to dismiss. If the motion is denied, the Court will afford Respondent adequate time to respond to Petitioner's claims on the merits.

e. If Respondent does not contend that the Petition can be decided without the Court reaching the merits of Petitioner's claims, Respondent shall file and serve an answer to the Petition, and a memorandum of points and authorities in support of such answer, pursuant to Rule 5 of the Rules Governing § 2254 Cases no later than **March 3, 2008**. At the time the answer is filed, Respondent shall lodge with the Court all records bearing on the merits of Petitioner's claims. The lodgments shall be accompanied by a notice of lodgment which shall be captioned "**Notice of Lodgment in 28 U.S.C. § 2254 Habeas Corpus Case — To Be Sent to Clerk's Office**." Respondent shall not combine separate pleadings, orders or other items into a combined lodgment entry. Each item shall be numbered separately and sequentially.

f. Petitioner may file a traverse to matters raised in the answer no later than **March 31, 2008**. Any traverse by Petitioner (a) shall state whether Petitioner admits or denies each allegation of fact contained in the answer; (b) shall be limited to facts or arguments responsive to matters raised in the answer; and (c) shall not raise new grounds for relief that were not asserted in the Petition. Grounds for relief withheld until the traverse will not be considered. No traverse shall exceed ten (10) pages in length absent advance leave of Court for good cause shown.

g. A request by a party for an extension of time within which to file any of the pleadings required by this Order should be made in advance of the due date of the pleading, and the Court will grant such a request only upon a showing of good cause. Any such request shall be accompanied by a declaration under penalty of perjury explaining why an extension of time is necessary.

h. Unless otherwise ordered by the Court, this case shall be deemed submitted on the day following the date Petitioner's opposition to a motion to dismiss and/or his traverse is due.

i. Every document delivered to the Court must include a certificate of service attesting that a copy of such document was served on opposing counsel (or on the opposing party, if such party is not represented by counsel). Any document delivered to the Court without a certificate of service will be returned to the submitting party and will be disregarded by the Court.

j. Petitioner shall immediately notify the Court and counsel for Respondent of any change of Petitioner's address. If Petitioner fails to keep the Court informed of where Petitioner may be contacted, this action will be subject to dismissal for failure to prosecute.

IT IS SO ORDERED.

DATED: November 27, 2007

HON. DANA M. SABRAW
United States District Judge

cc: all parties